

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JODY McCREARY §
v. § CIVIL ACTION NO. 6:11cv282
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND DENYING PETITIONER'S THIRD MOTION FOR RELIEF FROM JUDGMENT

The Petitioner Jody McCreary, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 challenging the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

McCreary was convicted of tampering with physical evidence on January 13, 2011, receiving a sentence of 12 years in prison. He sought federal habeas corpus relief, but after review of the pleadings, including the answer from the Respondent and the state court records, the Magistrate Judge issued a Report recommending that the petition be dismissed. McCreary filed objections, but the district court adopted the Report and dismissed McCreary's petition on March 5, 2012.

McCreary filed a notice of appeal, following this with a motion for relief from judgment under Fed. R. Civ. P. 60(b) on July 2, 2012. This motion was denied by the district court on August 15, 2012, and McCreary appealed this denial. On February 25, 2013, McCreary filed another motion for relief from judgment, which was summarily denied on March 1, 2013.

On February 26, 2013, the Fifth Circuit determined that McCreary was not entitled to a certificate of appealability or to proceed *in forma pauperis* on appeal. The denial of a certificate of appealability served to dismiss McCreary’s appeal.

On December 30, 2013, McCreary filed a “renewed motion for certificate of appealability.” This motion was denied by the district court on January 22, 2014.

Meanwhile, on January 16, 2014, McCreary filed his third motion for relief from judgment under Fed. R. Civ. P. 60(b). The Magistrate Judge issued a Report recommending that the motion be denied. McCreary filed objections to the Report on February 6, 2014.

In his objections, McCreary complains first that the guilty plea proceedings to which the Magistrate Judge referred were “never held.” The Court determined that this claim was unexhausted and thus procedurally barred in dismissing McCreary’s petition, and the Magistrate Judge reiterated this finding in the Report recommending denial of the motion for reconsideration. McCreary argues that this claim, and a claim that he was denied counsel, are not unexhausted because they can be raised at any time. In fact, McCreary’s claims are unexhausted because they were not presented to the highest court for the State of Texas in a procedurally proper manner. *Kittleson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005). This objection is without merit.

McCreary further complains that he was not represented by counsel at the time of the guilty plea which he says did not occur, so the Magistrate Judge erred in determining that McCreary’s *pro se* motions in state court had no legal effect because he has no right to hybrid representation under state law. The state court records show that McCreary was represented by an attorney named Kurt Noell. McCreary’s original petition in this case asserts that he received ineffective assistance of counsel, thus acknowledging that he was represented by counsel. This objection is without merit.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the Report of the Magistrate Judge and the Petitioner’s objections thereto. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Petitioner’s objections are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and the Report of the Magistrate Judge (docket no. 60) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Petitioner's motion for relief from judgment (docket no. 58) is hereby DENIED. It is further

ORDERED that the Petitioner's motion for extension of time in which to file a notice of appeal of the Magistrate Judge's Report and motion for leave to file a request for certificate of appealability (docket no. 64) is DENIED in that Reports of the Magistrate Judge are not appealable. Finally, it is

ORDERED that the Petitioner's motion to enter judgment in his favor and order his release from prison (docket no. 65) is DENIED.

So ORDERED and SIGNED this 24th day of March, 2014.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS".

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**